TIMOTHY E. WIRTH
2D DISTRICT, COLORADO

COMMITTEES
BUDGET
ENERGY AND COMMERCE
CHAIRMAN, SUBCOMMITTEE ON
TELECOMMUNICATIONS, CONSUMER
PROTECTION AND FINANCE
SUBCOMMITTEE ON HEALTH AND
THE ENVIRONMENT
SCIENCE AND TECHNOLOGY

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, D.C. 20515

WASHINGTON OFFICE
2464 RAYBURN HOUSE OFFICE
BUILDING
WASHINGTON, D.C. 20515
(202) 225-2161

DISTRICT OFFICE
3489 WEST 72ND AVENUE
SUITE 112
WESTMINSTER, COLORADO 80030
(303) 234 5200

January 25, 1985

CHAIRMAN'S OFFICE
RECEIVED
25 453
17866
SEC. & EXCH. COMM.

Honorable John S.R. Shad
Chairman
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Dear Chairman Shad:

I am writing to ask for the Commission's views as part of a comprehensive review of corporate tender offers and other contests for corporate control. This review is part of an effort begun by the Subcommittee on Telecommunications, Consumer Protection and Finance in the last Congress.

As you know, the Subcommittee's efforts in the 98th Congress were directed at developing legislation to remedy major abuses and regulatory gaps in the laws governing corporate takeovers. After the Subcommittee concluded its initial hearings in May of last year, it was clear that in the short time remaining in the last Congress we could not settle all of the major issues raised by takeovers. Accordingly, H.R. 5693, the Tender Offer Reform Act of 1984, attempted to address the most obvious regulatory gaps, such as the 10-day "window" for reporting 5% acquisitions to the Commission and the unequal regulation of bank and broker-dealer proxy processing, as well as what were believed by Members to be some major abuses: the payment of "greenmail," the adoption of "golden parachutes" during a tender offer, the issuance of stock to prevent a takeover, and others. However, the session ended before our work was complete.

In developing H.R. 5693, Committee Members acknowledged that a broader review of major issues would have to be undertaken in the 99th Congress, whether or not the bill was enacted into law. Some of the major issues to be addressed were set forth in the report on the legislation (H. Rept. 98-1028). We are now beginning that review. As part of that effort, I am asking that the Commission consider the questions set forth in the Committee report and respond to each of them in detail. To the extent that you believe some issues are more critical than others, please so indicate. In addition, you should understand that the listing of issues was not intended to be exclusive, but a starting point. If you believe there are other major factors to be considered, please so indicate.

The purpose of such a broad review should be obvious. Based on the experience with H.R. 5693 in the last Congress, it was clear that many affected individuals and groups felt that certain fundamental issues had not been fully considered by the Commission's Advisory Committee on Tender Offers or, subsequently, by the Commission as it developed a legislative proposal based on the Advisory Committee's recommendations. Members of the Subcommittee and I were willing to try to move the Commission's bill, however, because we believed the Commission's proposals, with the amendments adopted by the Subcommittee and full Committee, would serve a useful purpose in lowering the level of takeover combat while we explored the broader issues.

We now have a full two-year period within which to undertake the broader effort. In view of the complexity of the issues, it will take all of the interested groups and individuals, working together, to identify the critical problems, to develop a consensus on basic principles and objectives, and to move from there to agreement on whether legislative solutions may or may not be needed.

I would observe that the Commission's participation in this process is critical. For this reason, I am hopeful that the Commission's efforts will be more constructive than those of last year.

I was both surprised and disturbed when I read the Commission's memorandum opposing H.R. 5693 -- legislation that was essentially the Commission's bill. I might comment that I was not the only one shocked by the Commission's reversal on the bill. Indeed, a number of outside observers suggested that the Commission's "flip flop" must have been dictated by political opposition to the legislation. They simply found no other explanation for what most of us viewed as a sudden shift in position.

Of the major provisions of the bill, virtually all except three were the Commission's own draft legislation. Those included: (1) giving the Commission authority to regulate the proxy processing activities of banks; (2) closing the "13 (d) window"; (3) curbing "golden parachutes" during a takeover battle; (4) requiring a shareholder vote for "greenmail" payments; (5) limiting the issuance of stock as a defensive measure during a tender offer; and (6) limiting stock repurchases by a target company during a tender offer. Clarifying language was added to certain provisions, and rulemaking authority was substituted for statutory limitations on certain activities.

We added to the Commission's core bill the provisions of H.R. 5250, calling for equal margin treatment of U.S. and foreign purchases of securities, which was similar to a bill that passed the House overwhelmingly in the 97th Congress. With respect to tender offer reform, only two provisions were added to the

Commission's bill: a small extension of the minimum offering period and a provision for slightly enhanced disclosure of the impact of tender offers on communities and employees. Members believed these two provisions made sense substantively, and they also believed they were necessary to balance a bill which virtually all experts believed was "tilted" in favor of "raiders," when it came to us from the SEC.

Given these facts, I think I speak for most of the Subcommittee Members in saying that we were surprised and extremely disappointed at the Commission's opposition to the bill. It was essentially the Commission's bill!

Although we are not focusing on specific legislation at this early stage of the process in this Congress, the two provisions of H.R. 5693 most strongly "opposed" by the Commission will, in my judgment, be seriously considered by Members when we get to the bill-writing stage. I want to discuss the Commission's comments on those and certain other provisions in the hopes that the Commission will give them more careful consideration in the future.

Community Impact. As you must know, Members were extremely concerned about the impact of takeovers on communities that serve major corporate facilities. A serious concern, expressed by Rep. Michael Oxley at the Subcommittee's hearings was that, apart from the ultimate disruption and dislocation that may follow a completed takeover, there is often great uncertainty and fear in the affected communities during the course of a takeover battle.

We determined to address this concern under the existing regulatory structure. Because Section 13(d) of the Exchange Act already requires disclosure by a bidder of "...any plans or proposals...to liquidate (the target company), to sell its assets or merge it with any other persons, or to make any other major change in its business or corporate structure...," we determined simply to expand that requirement to require disclosure by a bidder of "any major change which would affect the communities in which (the target) operates, including a change in the location of its principal executive office or of a material portion of its business activities,...a change in the number of employees or...in the compensation or benefits that are provided to employees." The expanded disclosure would have served the purpose of disclosing to shareholders and others the plans of a bidder which could result in dramatic changes in the companies involved.

The Commission's memorandum stated two reasons for its opposition to the provision. First, the Commission stated that "this type of disclosure should not become part of the federal securities laws, because it is unrelated to the objectives of the federal securities laws and falls outside of the Commission's expertise." The memorandum spoke about the "inadvisability of using the federal securities laws to further social goals beyond those of shareholder protection."

It is unclear to me how the Commission believes additional disclosure to shareholders about planned events which could have a significant economic impact on the target company, its employees and the communities in which it operates is "unrelated to the objectives of the federal securities laws." As a starting point, I would suggest that many of the employees and citizens of the affected communities are also shareholders. Indeed, at the Subcommittee's hearings, Rep. Oxley spoke about a member of his family who "...was put in the...very difficult position of having to make a decision very quickly, as it not only affected him as a stockholder but it affected him as a citizen of Findlay and of Ohio."

But the importance of this information to shareholders goes beyond the special needs of shareholder-employees and shareholder-citizens. Certainly it is important to other shareholders to know what the impact of an acquisition will be on employees and communities. In many cases, this information may be critical in evaluating the potential future performance of the company. Moreover, as the recent Phillips example makes so clear, the support, or lack thereof, by a company's employees and the communities involved can help determine the ultimate success or failure of the takeover itself.

Members believed that forcing a bidder to think through the impact of an acquisition and make disclosure to the marketplace at an early stage certainly would be of value to shareholders. The Commission's consideration of this provision was, in my view, narrow-minded.

The Commission also stated another reason for opposing the provision. It stated: "It is unclear how the proposed community impact disclosure should be interpreted or applied. Such language as 'major change,' 'affect the community,' 'material portion,' and 'substantially affect' will create infinite litigation possibilities." On this point, I would simply observe that much of that language came from the current language of the statute itself. For example, "major change" is found in Section 13(d)(1)(C) of the Exchange Act, the very subsection amended by the bill. The word "material" is found throughout the federal securities laws (see, e.g., sections 11 and 17 of the Securities Act of 1933 and section 10(b) of the Exchange Act) 1934) and appears in section 13(d) itself. If the drafters of your memorandum had read the securities laws you are charged with overseeing, they might not have found the language of our bill so difficult.

I might also add that the draft proposal submitted by the Commission itself had a great deal of language in need of interpretation: "routine acquisitions", ordinary course" and "price above the market" were all terms we believed required report language clarification. As you well know, it always is possible to further clarify statutory language through report language and rule-making. The Commission's efforts would have been more productively spent on these kinds of constructive activities than on petty criticism intended to derail legislation the Commission suddenly found itself uncomfortable supporting.

Additional Time. The Commission also opposed the bill because it extended the current 20-business day minimum offering period to 40 calendar days -- an increase of about 10 to 12 days. It is difficult to believe an increase of this amount could bring about such strong opposition. Apart from the recommendations of the Commission's own Advisory Committee on Tender Offers, which advocated a shift to calendar days, most Members believed the current minimum offering period was simply too short. Testimony was received from a number of witnesses on this point, some of whom advocated an increase to 60 days.

Representatives of the state securities administrators advocated a 60-day period, stating that it would permit more time for rational decision-making and would also permit more time for competing bids at higher prices to develop. It also seemed logical that an extended time period would alleviate at least some of the pressure on management to rush into ill-conceived defensive actions simply to buy time. It was the Members' view that more time, coupled with restrictions on defensive actions, would produce better decisions.

Moreover, in the view of many experts we consulted, the Commission's own legislative proposal demanded more time. Did the Commission really believe it is possible for corporate management to carefully consider alternatives, propose a course of action and obtain a shareholder vote on the issuance of stock during a tender offer in 20-business days? The Commission's own shareholder vote provisions would be essentially meaningless without sufficient time to conduct the proxy solicitation.

In its comments on the legislation, the Commission stated: "In adopting Rule 14e-1 in 1979, which set the current 20-business day minimum offering period, the Commission carefully struck a balance between providing sufficient time for shareholder decision-making and maintaining neutrality in tender offer regulation." More recently, the Commission's Director of Corporation Finance told the audience at an American Bar Association meeting that the Commission conducted an extensive study to determine that 20-business days was the optimum time period for tender offers.

I would appreciate your describing the study undertaken by the Commission at the time of establishing Rule 14e-1 and any additional studies, as well as any and all data proving that the 20-day period is optimum. I would also appreciate the Commission memoranda on this issue and any and all releases, as well as a summary of comments and factual data supporting the Commission's decision.

Trigger Mechanisms. The above two issues, in my view, will be important issues throughout the debate in this Congress. I would like to touch upon the other major criticism in the Commission's opposition memorandum. Frankly, I found it rather astounding. The Commission's draft proposal placed certain restrictions on the adoption of golden parachutes and the issuance or acquisition of securities by a target company during tender offers that were both unconditional with respect to at least 10% of the target's securities and at a price at least 25% more than the average market price for such securities during the ten trading days prior to the tender offer's commencement.

After discussions with a number of experts who found the Commission's so-called "triggers" too unrealistic or too inflexible, I and the Members determined to drop those triggers, believing that such a degree of legislative specificity was not needed when the Commission was given ample express rulemaking and exemptive authority under the bill. Not only was that authority clear under the bill, but at the Subcommittee markup I engaged in a colloquy, which had been carefully drafted with the Commission staff, to make it expressly clear that the removal of the triggers from the statute should in no way be interpreted to limit the Commission's rulemaking or exemptive authority in this area. Moreover, following the full Committee markup, the Subcommittee and Commission staffs worked together to develop Committee report language on this very point.

The Commission's memorandum totally disregarded this history, as well as the express rulemaking and exemptive authority given the Commission in the bill. Either the drafters of your comments were unaware of our many discussions with Commission staff and the specific rulemaking authority placed in the statute -- a lack of professionalism and thoroughness uncharacteristic of the good work I expect from the Commission -- or they were aware of it but chose to ignore it for the purpose of attempting to derail our efforts to pass the bill -- something I find disturbing for other reasons.

"Balance" of the Legislation. The Commission concluded in its opposition memorandum that: "given these three flaws, the legislation would upset the balance between bidders and targets to the detriment of the efficiency of the nation's securities markets and the interests of shareholders."

In my review of a number of comments on the bill, I found it interesting that the bill was perceived to be weighted either too heavily toward bidders or too heavily in favor of targets, depending upon the perspective of the commentators. Indeed, the National Association of Manufacturers argued the former; the Administration the latter.

It was unclear to me just what position the Commission was taking. Since you are the experts -- and since we all must go through this exercise again -- just how much weight on behalf of bidders and targets did the Commission give to each provision of the bill? In the Commission's view, was the bill, in the aggregate, weighted toward bidders or toward targets and in what proportion (e.g., 60% toward targets; 40% toward bidders)? Did the Commission believe its bill, as originally submitted, was balanced 50-50? Does the Commission believe the current law is balanced, in view of the number of companies that are "targeted" compared with the number that are eventually acquired by the original bidder or some other company? Does the Commission have any data on this point?

I would appreciate the Commission's prompt attention to the questions raised in this letter. If you have any questions about this letter, please call me or Marti Cochran of the Subcommittee staff. I look forward to working with you in the coming Congress on these important issues.

With best wishes,

Sincerely yours,

Tim Wirth

Timothy E. Wirth